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CHARLES ELMORE CRO
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Supreme Court of the United States

OCTOBER TERM, 1944

No. 1083

MURRAY COHEN,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR REHEARING

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Your petitioner, Murray Cohen, by this petition moves to have reheard the petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit entered on March 12th, 1945 (#248 February Term 1945). The petition for writ having been denied, now your petitioner, Murray Cohen, prays that said petition may be reheard and upon such rehearing that the aforementioned petition be granted.

Questions Involved

FIRST: If the petitioner contends that he did not know that Draft Board records had been falsified in order to give him a 4-F Classification for "hernia", and where it is shown that the petitioner had suffered at or about the time of said falsification of records from a sinus condition and hay fever, and that the said petitioner had been

operated upon for the sinus condition or the like, and where the petitioner contends that he did not know about the "hernia" condition until he was so informed by F.B.I. agents, many months after falsification of records, and where the F.B.I. agent upon rebuttal denies mentioning "hernia" to the said petitioner at a time near petitioner's arrest, and where the F.B.I. agent states in open court on such rebuttal that he refreshed his memory as to what transpired at such meetings with the defendant from notes, and he denies that the word "hernia" is in the notes, is the refusal to produce these notes for the trial at the request of defense counsel, to test or impeach the credibility of the witness upon such rebuttal testimony grossly prejudicial, and should such notes have been presented to the jury as triers of the facts?

SECOND: Where such evidence is used by a witness to refresh his recollection, is such evidence, to wit, notes, admissible to test the memory of the witness and then his credibility, and as such are the notes privileged and do they constitute a part of the Government file where no definite testimony is given to show that they are in the files of the U. S. attorney?

THIRD: Is the excluded evidence reason for reversal, where it is shown that the petitioner was first informed of the "hernia" condition about seven months after falsification of the records, and where the notes would reveal that the defendant was first informed of a "hernia" at such later meeting with Government agents, and wouldn't such disclosure of "hernia" at the later meeting have completely exonerated the defendant of any duplicity, where he contends that the first time he learned of such "hernia" condition was at the meeting with the agents? Wouldn't such notes if they disclosed that the petitioner

was first informed of a "hernia" condition at such later date, brand the Government witness (Leonard) as a conspiring extorter, who by his own admission had altered records and is guilty of a forgery?

FOURTH: After the Federal Court refused to compel the production of the questioned notes, should the Circuit Court of Appeals upon argument of the appeal have looked at the questioned notes, and wasn't such perusal by the Circuit Court prejudicial for the following reasons?

(a) Were these the same notes about which the agent previously testified to with respect to refreshing his recollection, and were they the same notes which the petitioner was not given the opportunity to examine?

(b) Should the Circuit Court of Appeals receive evidence which is not part of the record and then judge as a court of original jurisdiction, which it must necessarily have done, to determine whether or not the refusal to produce such notes was reversible error?

Facts

The indictment charged the Petitioner and one John Francis Leonard with the crime of conspiracy to violate the provisions of the Selective Service and Training Act (U. S. C. A. 311, Record on Appeal, pages 5, 6 and 7), to wit; "to knowingly make and be a party to the making of a false statement as to the physical unfitness and non-liability of Murray Cohen, Petitioner herein for service under the provisions of the Selective Service Training Act and Rules, Regulations and Directions made pursuant hereto."

The indictment contains further language showing the alleged method adopted by the defendants in carrying out their conspiracy and specifically mentions the making of a false statement as to the physical unfitness of Murray Cohen, the Petitioner, in that he was therein falsely represented as having a hernia and entitled to a classification of 4F on account of such physical ailment (pp. 5, 6 and 7).

John Francis Leonard the person indicted with the Petitioner was a member of the Local Draft Board #20 where Petitioner registered.

The Government upon the trial proved the making of the false statement as to the physical unfitness and nonliability of Petitioner through the testimony of the said John Francis Leonard who having pleaded guilty to the indictment, testified on behalf of the Government and admitted that he was the one who made the false statement in the record as to the physical unfitness of Murray Cohen (p. 84). Said Leonard testified that he used the form of another person who had been found to have had a hernia by the medical examiners and said that he erased the name of such other person and inserted the name of Petitioner in place thereof all of which he did at the Local Draft Board in the presence of one Wilson a co-member of the Draft Board on or about May 20, 1943. Murray Cohen, your Petitioner was not present at the time such false statement was made in his physical record (pp. 84-131).

Your Petitioner took the stand in his own defense and denied that he had ever conspired with either Leonard or Wilson to do this unlawful act and never knew that it had been done or was going to be done until he was informed of such fact by the agents of the Federal Bureau of Investigation—in the month of December, 1943, some seven months after its commission (pp. 184-187. 221).

The trial of the case hinged mostly on the contention made by your Petitioner that he first learned of the alteration in his physical record from the mouths of the members of the Federal Bureau of Investigation in the month of December, 1943 seven months after his said record had been altered as hereinabove mentioned.

The Government called in rebuttal the two members of the Federal Bureau of Investigation who had examined Petitioner on December 6, 1943 (pp. 275, *et seq.* and pp. 306, *et seq.*). These agents testified that they made written notes of all questions propounded to and answers given by your Petitioner on December 6, 1943 (pp. 285, 290, 301 and 314). They both stated that they had examined their notes on the day of the trial in preparation for their testimony (pp. 285-291, 314). Both these witnesses testified as refreshed from their notes as to each question and answer made upon said examination of Petitioner on December 6, 1943. Their testimony was tantamount to a statement obtained from Petitioner. They both denied that they had informed Petitioner that he was 4F on account of a hernia. They both stated that the word "hernia" was not mentioned during the course of the examination. They likewise stated that the words "hay fever" or "sinus" was not mentioned during the course of said examination of the Petitioner. Such testimony given by these members of the Federal Bureau of Investigation was in direct conflict with the testimony of your Petitioner who had preceded them on the witness stand at the trial. Petitioner had, as the record shows, claimed he suffered from hay fever and sinus. This claim was on file with Petitioner's Draft Board.

Upon the cross-examination of the members of the Federal Bureau of Investigation called as Government

witnesses, a request was made by Petitioner's counsel for the production of the written notes so made by these witnesses. Objection was interposed by the District Attorney which objection was sustained by the Trial Court (pp. 290-314). The written notes were not produced and were not examined by the Trial Court.

The Government's Contention

The government contended in opposition to the petition that a Trial Court's refusal to require the production of memoranda used by a government witness to refresh his recollection before taking the stand, is not reversible error.

To support this contention, appearing in the Government's brief in opposition to the original petition, the Government sets forth two cases:

(a) *Goldman* v. *United States,* 316 U. S. 129;

(b) *United States* v. *Ebeling,* 146 F. 2nd 254.

The cases cited by the Government are not controlling in the case at bar, and a further examination of these cases will reveal that if anything, they are decisions which aid the petitioner.

The *Goldman* case, *supra,* according to the Government, held as follows:

> "We think it the better rule that where a witness does not use his notes or memoranda in court, a party has no absolute right to have them produced and to inspect them. Where, as here, they are not only the witness' notes but are also part of the Government's files, a large discretion must be allowed the trial judge."

The *Goldman* case, *supra,* had a dissenting opinion by Mr. Justice Murphy, and in which decision Mr. Justice Jackson took no part. It seems to appear further that Justices Stone and Frankfurter do not join the majority of the Court in its opinion.

The *Goldman* case, according to the report of the decision in the Circuit Court, involved notes and memoranda made by agents during the investigation and the material involved constituted a substantial portion of the Government's case, and the question came up upon the trial as well as upon the motion to suppress evidence.

The *Ebeling* case quoted by the Government in its brief in opposition states as follows:

> " 'The record here shows nothing to suggest any impeaching value' in the notes * * *"

Petitioner wishes to set forth now minutes of the trial dealing with the "notes" in question, and will then attempt to show why the case at bar is distinguishable from the *Goldman* and the *Ebeling* cases relied upon by the Government.

Excerpt from Record, page 285:

> *"James A. Davis, Jr.—For Government—*
> *Rebuttal, Cross*
>
> Q. I take it for granted that before you became a witness here you refreshed your recollection? A. Yes, sir.
>
> Q. From a written statement that you had prepared? A. From my reports that I prepared, yes, sir.
>
> Q. When did you prepare those reports? A. At various times during the course of the investigation.
>
> Q. Did you ever prepare a report on December 6th? A. I took notes on that day.

Q. What? A. Notes were taken on that day.

Q. Did you take the notes down? A. No, sir.

Q. Who took the notes down? A. Mr. Johnson.

Q. Where is Mr. Johnson? A. He is not in the city at the present moment.

Q. Have you got the notes? A. I do not have them on me, sir.

Q. So that when you testified today about what took place on December 6th, 1943, you are testifying from your memory, aren't you? A. My refreshed memory, sir."

Excerpts from Record, pages 314, 315:

"Charles M. Johnson—For Government—Rebuttal—Cross

Q. Who took down the notes? A. I took the notes.

Q. How did you take them down? A. In pen and ink.

Q. In longhand or shorthand? A. In longhand.

Q. Did you make them then and there, the notes? A. Yes, sir, I did.

Q. Did you after this meeting was over then transcribe them and more fully set forth what you had learned in your interview? A. I did not.

Q. You kept the original notes? A. No. Immediately after the interview I gave those notes to Mr. Davis.

Q. Were those the notes that you had made during this question and answer period with Mr. Cohen? A. Yes, sir.

Q. When did you see those notes last? A. About 9:45.

Q. Have you got those notes? A. No, sir.

Q. You haven't got them with you? A. No, sir.

Q. Where are they? A. They are in the—to the best of my knowledge they are in the files of the office.

Q. That is, in this building, isn't it? A. Yes, sir.

Q. Would you go there, please, and get those notes?

Mr. Murphy: Your Honor, the witness hasn't said that he needed the notes to testify when he was on the stand this morning.

Mr. Sheridan: I want them this morning.

Mr. Murphy: I submit he is not entitled to examine them.

The Court: I sustain the objection.

Q. Did you read those notes at 9:15 this morning? A. About 9:45 is the last time I saw them.

Q. Was the word 'hernia' on those notes on those notes that you read at 9:50? A. No, sir, it was not.

Q. Was there any question about a hernia being asked? A. No, sir.

Q. Do those notes refer exclusively to Mr. Murray Cohen's case? A. Yes, sir, they do.

Q. In other words, those notes that were made on December 6th that you looked at at 9:50 this morning do not pertain to any case other than the case we are trying? A. That is correct.

Q. Now in those notes are the words 'hay fever' mentioned? A. No, sir, that word is not mentioned.

Q. Is the word 'sinus' mentioned? A. No, sir.

Q. Are the words 'sinus operation'? A. No, sir, it is not.

Q. In those notes is a question asked, either by you or Mr. Davis, of Mr. Cohen in which either one of you say to him, 'Have you a hernia'? A. No, sir. The notes reflect that neither Mr. Davis nor I asked any such question."

Basis for Rehearing

The *Goldman* and *Ebeling* Cases Are Distinguishable from the Case at Bar

FIRST: There is no positive statement in the minutes that the notes involved in the case at bar were part of the Government's files.

SECOND: It appears from the testimony that the notes at best were in the possession of the F.B.I. and were not part of the files of the United States Attorney.

THIRD: In the *Goldman* case, the memoranda involved there covers a substantial portion of the Government's case. In the case at bar the evidence sought was not substantial and was intended to merely impeach the credibility of the witness.

FOURTH: In the *Ebeling* case, there was no reason to suggest that the memoranda sought had impeaching value. In the case at bar, if the notes disclosed that the word "hernia" was used, then the jury could have found that the witness lied and that the petitioner really learned of the "hernia condition" at such later date.

Again, it would appear, according to the *Goldman* case, that where the notes are witnesses' notes and part of the Government files, the Judge is given wide discretion as to their production. In the case at bar, the point of whether the word "hernia" appeared in the notes was so vital to the petitioner's case, it would seem that failure to order the production of the notes would be an abuse of discretion.

WHEREUPON your petitioner respectfully prays that this petition for a rehearing be granted and that the peti-

tion for a writ of certiorari to the U. S. Circuit Court of Appeals for the 2nd Circuit be granted.

Respectfully submitted,

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ABRAHAM TEITELBAUM,
Of Counsel.

Certificate

To the Supreme Court of the United States:

The undersigned, Morris Teitelbaum, of the firm of Teitelbaum & Teitelbaum, the attorneys for petitioner, Murray Cohen, hereby certifies that the foregoing petition for a rehearing is presented on behalf of the petitioner in good faith and not for delay.

Dated, May 10, 1945.

Respectfully submitted,

Morris Teitelbaum,
for Abraham Teitelbaum,
Of Counsel for Petitioner.

End